

# “SUBSIDIARITY”: WHAT’S IN THE NAME FOR CONSTITUTIONAL INTERPRETATION AND ADJUDICATION?

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## 1 Introductory remarks

“I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.”<sup>1</sup>

This seemingly unspectacular dictum comes from the minority judgment in the controversial *Mhlungu* case,<sup>2</sup> one of the earliest judgments of the South African Constitutional Court. Though it is not often cited (both in the literature and the case law) the said dictum seems to articulate a “principle” of considerable significance.<sup>3</sup> The purpose of this article is to show that this dictum and the “principle” to which it refers are commensurate with and indeed a verbalisation of the notion of *subsidiarity* which, subject to caveats, has a constructive role to play in constitutional interpretation and adjudication. It will moreover be argued that (and shown why) it is desirable to name (and thereby explicitly recognise) the hitherto unnamed “*Mhlungu* principle” as an instance of adjudicative subsidiarity, and to distinguish it from other forms of subsidiarity which are also of interpretive and adjudicative significance.

## 2 “Subsidiarity”: general observations

When looking for a dictionary definition of subsidiarity a first observation of significance is that most dictionaries — and especially

<sup>1</sup> Per Kentridge AJ in *S v Mhlungu* 1995 7 BCLR 793 (1995 3 SA 867) (CC) par 59; cf also *Motsepe v Commissioner for Inland Revenue* 1997 6 BCLR 692 (CC) par 21; *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 1 BCLR 39 (CC) par 21; *Minister of Education v Harris* 2001 11 BCLR 1157 (CC) par 19.

<sup>2</sup> The case was controversial not because of the dictum abovesaid, but because the Court was split almost in the middle on the question precisely how literal an assumedly “technical” provision of the transitional Constitution had to be construed. Subsequently the majority of the Court was criticised for violating the language of (what was perceived to be) rather straightforward, clearly worded “black-letter” law cf eg Fagan “The longest Erratum Note in History. *S v Mhlungu and Others* Constitutional Court 25/94; 1995 (3) SA 867 (CC); 1995 (7) BCLR 793 (CC)” 1996 *SAJHR* 79 and “The Ordinary Meaning of Language – A Response to Professor Davis” 1997 *SAJHR* 174. Other commentators subsequently stepped in with a spirited defence of the majority’s non-literalist approach cf Davis “The Twist of Language and the Two Fagans: Please Sir May I Have Some More Literalism” 1996 *SAJHR* 504; De Ville “Eduard Fagan in Context” 1997 *SA Public Law* 493 and Mischke “This is a (Foot)note in G Minor” 1997 *SA Public Law* 514.

<sup>3</sup> Cf eg Currie & De Waal *The New Constitutional and Administrative Law* 1 (2001) 328.

older and South African ones — contain no entry for “subsidiarity” / “subsidiariteit”.<sup>4</sup> *The New Oxford Dictionary of English* describes *subsidiarity* “in politics” as “the principle that a central authority should have a subsidiary function, performing only those tasks which cannot be performed at a more local level”.<sup>5</sup> In *The Shorter Oxford English Dictionary*,<sup>6</sup> a similar definition is preceded by the observation that subsidiarity is “[t]he quality of being subsidiary”. These dictionary definitions imply that subsidiarity — a principle tracing its origins to Roman Catholic social thought<sup>7</sup> and, more particularly Pope Pius XI’s encyclical *Quadragesimo Novarum* from the year 1931 — centrifugalises the power of social institutions or bodies functioning within the ambit of one and the same social sphere.

*Meyers Lexikon: Das Wissen A-Z*<sup>8</sup> describes *Subsidiarität*<sup>9</sup> as “das Zurücktreten einer von mehreren an sich anwendbaren Rechtsnormen kraft ausdrückl. oder durch Auslegung zu ermittelnder gesetzl. Anordnung”. This very German description defies literal translation into English.<sup>10</sup> What it envisions is a situation in which several legal norms are in themselves<sup>11</sup> applicable, but an explicit legal<sup>12</sup> directive — or a directive established through interpretation — excludes one of the (contending) legal norms from consideration for application in that particular situation — the said norm “steps down”, as it were. According to this description, subsidiarity does not necessarily require (but also does not exclude) either a hierarchy or a variance in the scope or comprehensiveness of the norms considered for application. It simply states that subsidiarity manifests as the law’s preference for legal norms A and B and C for — and the exclusion of legal norm X from — possible application in a given situation.

There is a paucity of references to subsidiarity in South African case law, but the references that do occur reflect a perception of subsidiarity commensurate with (though not identical to) the description in Meyers. In *Absa Bank Ltd t/a Bankfin v Stander t/a CAW Paneelkloppers*,<sup>13</sup> Van Zyl J agreed with two legal scholars’ assertion that, in German law, the availability of an action for *indirect* enrichment only when an action for *direct* enrichment is not possible or enforceable, constitutes a

<sup>4</sup> Van Wyk *Subsidiariteit as Waarde wat die Oop en Demokratiese Suid-Afrikaanse Gemeenskap ten Grondslag Lê* in Carpenter (ed) *Suprema Lex. Essays on the Constitution Presented to / Opstelle oor die Grondwet Aangebied aan Marinus Wiechers* (1998) 251 252 seems to have had a similar experience.

<sup>5</sup> Pearsall (ed) *The New Oxford Dictionary of English* (1998) 1851.

<sup>6</sup> *The Shorter Oxford English Dictionary on CD-ROM* 5 ed Version 2.0 (2002).

<sup>7</sup> Kommers *The Constitutional Jurisprudence of the Federal Republic of Germany* 2 ed (1997) 113; Van Wyk *Subsidiariteit* 254.

<sup>8</sup> *PC Bibliothek. Meyers Lexikon: Das Wissen A-Z* (1993).

<sup>9</sup> Derived from Latin.

<sup>10</sup> It can more literally be translated into Afrikaans as “die terugtrede van een van meerdere as sodanig aanwendbare regsnorme kragtens uitdruklike of deur uitleg bepaalde wetsverordening”.

<sup>11</sup> Or “as such”.

<sup>12</sup> “Legitimate” is also implied.

<sup>13</sup> 1998 1 SA 939 (C) 947B.

“subsidiarity principle”. In *Ex Parte Minister of Safety and Security: In Re: S v Walters*,<sup>14</sup> the permissibility of force to make an arrest *only where there are no lesser means of achieving the arrest*, was said to be an instance of “subsidiarity”. In the two examples just mentioned, subsidiary is not concerned with the identification and empowerment of an appropriate institutional actor (a body or an organ) to make a decision, perform a function and/or fulfil a duty. The subsidiarity in question is decision- or issue-centric instead, and strategically significant in the identification and implementation of normative means to negotiate the exigencies of a situation at hand. It makes sense, therefore, to distinguish between *institution-centric* and *problem- or issue-centric subsidiarity* — *institutional* and *strategic subsidiarity* for short. The “Mhlungu principle” verbalises preference for a particular adjudicative *reading strategy*, thereby instantiating the latter form of subsidiarity. Though strategic subsidiarity involves a *reading strategy*, while institutional subsidiarity, on face value, does not do so, both forms of subsidiarity are significant for constitutional interpretation and adjudication. The “readers’ instructions” encountered along the route of strategic subsidiarity, are directed at an authorised readership identified and empowered in accordance with procedures put forward by institutional subsidiarity. To really fathom the significance of subsidiarity for constitutional interpretation and adjudication, both forms of subsidiarity must therefore duly be considered, and it is preferable to start off with institutional subsidiarity which, historically, first gained explicit recognition (and which, according to most dictionaries, seem to be the default version of “subsidiarity”).

Before proceeding, however, a question relating to both institutional and strategic subsidiarity — and not requiring an answer right now — must be posed: Is “[t]he quality of being subsidiary” (in *The Shorter Oxford English Dictionary*’s<sup>15</sup> definition of “subsidiarity”) attributable primarily to subsidiary (and subordinate) or rather to comprehensive (and superordinate) doers/institutions/norms? I hope to show (eventually) that this question does not allude to but a terminological triviality, and that engagement with it could add to the profundity of one’s understanding of (and to profitable reliance on) subsidiarity in its various manifestations in diverse situations — and in constitutional interpretation and adjudication in particular. But the subsidiarity landscape first calls for further exploration.

### 3 Institutional subsidiarity

Institutional subsidiarity, as a force in societal life, constrains any more encompassing or superordinate institution (or body or community) to refrain from taking for its account matters which a more particular, subordinate institution (or body or community) can appropriately

<sup>14</sup> 2002 7 BCLR 663 (2002 4 613) (CC) par 22.

<sup>15</sup> *Shorter Oxford English Dictionary on CD-ROM*.

dispose of, irrespective of whether the latter is an organ of State or of civil society.<sup>16</sup> This description reminisces (and is in actual fact a repetition of) the dictionary definitions of “subsidiarity” previously looked at — with the exception of that of Meyers, but Meyers provides a definition for the “*principle* of subsidiarity” which is very similar to other dictionaries’ definition of “subsidiarity” (and therefore also to the definition of institutional subsidiarity just put forward).<sup>17</sup> It was suggested before that (institutional) subsidiarity enhances the centrifugalisation of the power of social institutions or bodies *vis-à-vis* one another. These institutions or bodies must, however, share some sense of relatedness (coupled with commitment to a common purpose) *inter se*. There are variations on this theme of relatedness. Among various organs of one and the same institution or social sphere (the/a State, a church, a company), for instance, the sense of relatedness will be relatively strong. The less rigidly defined the realm within which interaction between institutions or bodies as organs of society takes place, the weaker will their sense of relatedness be, and beyond an appreciable overlap in the objectives that these organs pursue (or meaningful points of tangency in the functions that they fulfil) a sense of relatedness sufficient to sustain institutional subsidiarity will hardly subsist. Furthermore, the devolution of responsibility (and power) from more central (and more intensely empowered) levels (or spheres) of governance to more local (and less intensely empowered) levels (or spheres) is a typical concern of institutional subsidiarity. This form of subsidiarity can thus not have effect in the absence of social institutions or bodies or organs at different levels of centrality and with authority varying in intensity or degree.

As a legal principle institutional subsidiarity is well established (and readily relied on) in, amongst others, the law of the European Union and in German constitutional law. In European law, for instance, it helps determine whether an organ of the Union or rather an organ of a member State should dispose of a matter,<sup>18</sup> and it has, in this format and at the behest of (among others) Germany (the German *Länder* in particular)<sup>19</sup> and Britain, been incorporated into Article 3b of the *Maastricht Treaty*. In German constitutional law<sup>20</sup> institutional subsidiarity has informed federalism decisively.<sup>21</sup> Dawid van Wyk, the only South African constitutional scholar to have published a piece of some substance on

<sup>16</sup> As Benda, Maihofer & Vogel (eds) *Handbuch des Verfassungsrechts* 2 ed (1995) 1051 has it: “Nach diesem Prinzip soll das, was die kleineren und untergeordneten Gemeinwesen leisten und zum guten Ende führen können, nicht für die weitere und übergeordnete Gemeinschaft in Anspruch genommen werden.” [“According to this principle a comprehensive, superordinate community ought not to take for its account any matter that a smaller, subordinate community can deal with and bring to a good end.”]

<sup>17</sup> *Meyers Lexikon: Das Wissen A-Z*; see also n 107 *infra*.

<sup>18</sup> Cf the *Maastricht Case* (1993) 89 *BverfGE* 155. Art 23(1) of the German Constitution (dating from 1993) provides that Germany’s relationship with the European Union is based on subsidiarity.

<sup>19</sup> Van Wyk *Subsidiariteit* 253.

<sup>20</sup> Cf for a helpful and insightful overview Van Wyk *Subsidiariteit* 254-259.

<sup>21</sup> Benda, Maihofer & Vogel (eds) *Handbuch des Verfassungsrechts* 1051-1052.

subsidiarity,<sup>22</sup> relies on comparative examples from German constitutional law for an insightful exploration of the possible implications and applications of instances of subsidiarity (deliberately and not so deliberately) enshrined in South Africa’s 1993 and 1996 Constitutions.<sup>23</sup> He refers appreciatively to subsidiarity as an implied (or implicit) constitutional value<sup>24</sup> “at the root of an open and democratic South African society”<sup>25</sup> and shows convincingly that (and how) measured reliance on subsidiarity (can) largely compensate for the dearth of eye-catching federalist markers in South Africa’s constitutional text(s). The instances of subsidiarity Van Wyk discusses mostly relate to the relationship between the national, provincial and local spheres of government, in other words, to federalism as an *institutional* concern, but the determination of the powers and functioning of the various spheres (or tiers)<sup>26</sup> of government — and of the force and status of their legislation *vis-à-vis* one another — of course raises weighty *strategic* issues of constitutional interpretation and adjudication too. It will be unnecessary duplication, however, to revisit all the issues that Van Wyk has dealt with. The discussion of institutional subsidiarity in this article will therefore be limited to how — as forum- or court-specific *jurisdictional subsidiarity* — it conditions the designation of authorised adjudicative interpreters of the Constitution in specific instances.

#### 4 Jurisdictional subsidiarity

*Jurisdictional subsidiarity* as an instance of institutional subsidiarity<sup>27</sup> is concerned with the apportionment of responsibility and power to adjudicating fora. Its opposite number, instantiated by strategic subsidiarity,<sup>28</sup> is *adjudicative subsidiarity* which will be discussed more fully under the next heading.

In German constitutional jurisprudence, considerations of institutional subsidiarity are said to preclude the *Bundesverfassungsgericht* from adjudicating matters with which other fora can deal.<sup>29</sup> The South African Constitutional Court has ruled to a similar effect holding in *Amod v Multilateral Motor Vehicle Accident Fund*,<sup>30</sup> for instance, that the Supreme Court of Appeal was the more appropriate forum of higher instance to *develop* the common law — *in casu* the common law of delict regarding the claim of the dependent — in a manner contemplated in

<sup>22</sup> As one of several essays on the (South African) Constitution in a volume presented to Marinus Wiechers: cf Van Wyk *Subsidiariteit*.

<sup>23</sup> The Constitution of the Republic of South Africa, Act 200 of 1993 (“the transitional Constitution”) and the Constitution of the Republic of South Africa, 1996 (“the Constitution”) respectively.

<sup>24</sup> Du Plessis *Re-Interpretation of Statutes* (2002) 76.

<sup>25</sup> A “waarde wat die oop en demokratiese Suid-Afrikaanse gemeenskap ten grondslag lê”.

<sup>26</sup> In the South African Constitution the term “spheres” is preferred to “tiers” (or “levels”) as generic appellation for national, provincial and local (areas of) government.

<sup>27</sup> Cf par 3 *supra*.

<sup>28</sup> Cf par 2 *supra*.

<sup>29</sup> Hesse *Grundzüge des Verfassungsrecht der Bundesrepublik Deutschland* 19 ed (1993) 143.

<sup>30</sup> 1998 10 BCLR (1998 4 SA 753) 1207 (CC).

section 35(3) of the transitional Constitution (the predecessor to section 39(2) of the final Constitution).<sup>31</sup> Here institutional subsidiarity informed an answer to the *jurisdictional* question of which court should, for adjudication purposes, be the authorised reader of the constitutional text in that particular instance (and for the time being). The adjudicator-reader thus designated must be in a position to dispose of the matter, but does not have to do so as a forum of final instance. The fact that it may be an authorised reader *for the time being* in the sense that (some of) its findings may be subject to appeal, does not detract from — or reflect adversely on — its authorisation as adjudicator-reader. Going on appeal to a next (admittedly higher) forum is in the nature of adjudication, and is at any rate dependent on leave to do so (only) where there is a prospect that the next forum's findings might deviate from those of the forum *a quo*. Restraints on appeals, as a matter of fact, evidence jurisdictional-subsidiarity-at-work, as does the declared dependence of courts of appeal on a judgment (or judgments) *a quo* to maximise the quality of their own adjudicative performance (even in instances where they deviate from such adjudicative outcomes *a quo*). The Constitutional Court's avowed dependence on judgments *a quo* will be elaborated on below.

Since the Constitutional Court's landmark judgment in *Carmichele v Minister of Safety and Security*,<sup>32</sup> which lays down guidelines for strategies to develop the common law,<sup>33</sup> the *Amod* judgment cannot be understood to say that a forum like the Supreme Court of Appeal has a more pivotal say in developing the common law than the Constitutional Court itself has. The many instances in which development of the common law by fora other than the Constitutional Court have been induced by and have taken place to the unfaltering accompaniment of the *Carmichele* judgment,<sup>34</sup> bear testimony to the contrary. Furthermore, the crucial question in the *Amod* case was not just *how* to apply the

<sup>31</sup> These provisions enjoin any court developing the common law to "promote the spirit, purport and objects of the Bill of Rights" cf eg s 39(2) of the 1996 Constitution.

<sup>32</sup> 2001 10 BCLR 995 (2001 4 SA 938) (CC).

<sup>33</sup> It was held in this case that a court is always under an obligation to develop the common law and "this duty upon judges arises in respect both of the civil and criminal law, whether or not the parties in any particular case request the court to develop the common law under section 39(2) [of the Constitution]" (par 36). This obligation is not discretionary, but implicit in s 39(2) read with s 173 of the Constitution (par 39). When a litigant contends that, in the light of the Constitution, the common law has to be developed beyond existing precedent, a court is obliged to undertake a two-stage enquiry: "The first stage is to consider whether the existing common law, having regard to the section 39(2) objectives, requires development in accordance with these objectives. This inquiry requires a reconsideration of the common law in the light of section 39(2). If this inquiry leads to a positive answer, the second stage concerns itself with how such development is to take place in order to meet the section 39(2) objectives" (par 40). Generally speaking, the *Carmichele* case states courts' duty to develop the common law in the light of constitutional values unambiguously and in an activist vein. This reminisces (without explicitly citing) the constitutional injunction that the "state must respect, protect, promote and fulfil the rights in the Bill of Rights" (verbalised in s 7(2) of the Constitution).

<sup>34</sup> I shall not try and give a full list of cases where this happened — just some examples: *Brisley v Drottsky* 2002 4 SA 1 (SCA) pars 2-3; *Van Eeden v Minister of Safety and Security* 2002 4 All SA 346 (SCA) par 8; *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA) par 18; *Du Plessis v Road Accident Fund* 2003 11 BCLR 120 (SCA) par 36.

Constitution directly to (and in) the development of the common law. The more critical question was whether it was at all possible (and appropriate) to develop common law applicable to an occurrence predating the commencement of the transitional Constitution in a manner authorised (and indeed required) by that Constitution’s section 35(3). The Supreme Court of Appeal probably was the more appropriate forum (first) to try and answer this particular question.

In the *Carmichele* case the Constitutional Court moreover did not end up developing the common law itself. The case was referred back to fora *a quo* with a very clear and compelling message about those courts’ duty to develop the common law and, in the particular case, with clear indications of the relevant constitutional dictates that had to be honoured in doing so. This outcome is quite compatible with the exigencies of jurisdictional subsidiarity, with the higher, more comprehensive judicial authority providing lower, more localised doer-authorities with justificatory ammunition empowering them to square up to the task of developing the common law in a crucial area. The word “subsidiarity” was not on any of the Constitutional Court judges’ lips, though.

Jurisdictional subsidiarity could be trimmed down should the Constitutional Court become South Africa’s apex court *in all matters*.<sup>35</sup> However, it is hardly foreseeable that even as an apex court the Constitutional Court, in deciding any issue (including a constitutional issue) will part with its frequently declared dependence on judgments *a quo* to maximise the quality of its own adjudicative performance. By virtue of section 167(4) of the Constitution the Constitutional Court has exclusive jurisdiction in a limited number of matters, but the Court itself has made it clear that these instances are really exceptional, and the default mindset of the Court is to attach considerable weight to the benefits it can reap from the wisdom of a court or courts *a quo*:

“It is . . . not ordinarily in the interests of justice for a court to sit as a court of first and last instance, in which matters are decided without there being any possibility of appealing against the decision given. Experience shows that decisions are more likely to be correct if more than one court has been required to consider the issues raised. In such circumstances the losing party has an opportunity of challenging the reasoning on which the first judgement is based, and of reconsidering and refining arguments previously raised in the light of such judgement.”<sup>36</sup>

The Constitutional Court moreover sometimes prefers to refrain from ruling on the constitutionality of a statutory provision until such time as experienced judges in other fora have had the opportunity to assess the consequences of either retaining or striking down an impugned provision.<sup>37</sup>

<sup>35</sup> As is envisaged in the controversial Constitution Fourteenth Amendment Bill.

<sup>36</sup> *Bruce v Fleecytx Johannesburg CC* 1998 4 BCLR 415 (1998 2 SA 1143) (CC) par 8. See also *S v Bequint* 1996 12 BCLR 1588 (1997 2 SA 887) (CC) par 15; *Christian Education SA v Minister of Education* 1998 12 BCLR 1449 (1999 2 SA 83) (CC) pars 8 and 12; *Dormehl v Minister of Justice* 2000 5 BCLR 471 (2000 2 SA 987) (CC) par 5 and *Carmichele v Minister of Safety and Security* *supra* pars 50-53.

<sup>37</sup> According to Krieger J in *S v Bequint* *supra* par 14.

Section 167(4)(e) of the Constitution invests the Constitutional Court with exclusive jurisdiction to decide whether parliament “has failed to fulfil a constitutional obligation”. The recent judgment of the Supreme Court of Appeal in *King v Attorneys Fidelity Fund Board of Control*<sup>38</sup> provides a good example of how inarticulate considerations of (jurisdictional) subsidiarity can give rise to the narrowest possible reading of a seemingly generous, exclusive jurisdictional authorisation. The question in this case was whether allegedly insufficient public consultation in passing an Act of parliament amounted to a breach of the National Assembly’s constitutional obligation (imposed by section 59(1)(a) of the Constitution) to “facilitate public involvement in the legislative and other processes of the Assembly and its committees”, thereby precluding all courts other than the Constitutional Court from assessing parliament’s allegedly flawed action and pronouncing on the validity of the Act originating from such action. Notwithstanding the assumption that provision for exclusive jurisdiction to the Constitutional Court is meant “to preserve the comity between the judicial branch of government . . . and the legislative and executive branches . . . ensuring that only the highest court in constitutional matters intrudes into the domain of the principal legislative and executive organs of State”,<sup>39</sup> the Supreme Court of Appeal (per Cameron and Nugent JJA) opted for a narrow reading of section 167(4)(e), especially vis-à-vis section 172(2)(a) which authorises the Supreme Court of Appeal and High Courts to make an order concerning the constitutional validity of legislation in all spheres of government and of conduct of the president (subject to confirmation by the Constitutional Court).<sup>40</sup>

Adjudication of the constitutionality of legislation, the Supreme Court of Appeal thought, may inevitably involve an assessment of a law-maker’s legislative action and section 167(4)(e) certainly does not preclude the Supreme Court of Appeal (or a High Court) from finding that the National Assembly, for instance, adopted legislative provisions falling outside the scope of its legislative authority as defined by the Constitution (and most notably by the Bill of Rights), and that the Assembly in this sense “breached a constitutional obligation”.<sup>41</sup> The same applies should parliament fail to enact a statute “properly at all” negating requirements of “manner and form”. It is contentious, however, whether procedural prerequisites to the validity of legislation (invariably) impose “a constitutional obligation” as envisaged in section 167(4)(e).<sup>42</sup>

It is furthermore conceivable, according to the Court, that parliament may renounce its constitutional obligations to such an extent that it

<sup>38</sup> 2006 4 BCLR 462 (SCA) pars 13-14.

<sup>39</sup> *President of the Republic of South Africa v SARFU* 1999 2 BCLR 175 (1999 2 SA 14) (CC) par 29.

<sup>40</sup> *King v Attorneys Fidelity Fund Board of Control* *supra* pars 13-14.

<sup>41</sup> Par 16.

<sup>42</sup> Pars 17-18.



ceases to be (or to act as) the body which the Constitution calls “parliament”. Parliament could, for instance, thus renounce its constitutional obligation to act accountably, responsively and openly by convening in secret or at an undisclosed venue.<sup>43</sup> In such an event parliament will not be enacting legislation and it will be competent for a court other than the Constitutional Court to make such a finding. Well short of this extreme, however, parliament is left with considerable leeway to decide how to fulfil its constitutional obligations and it is (only) the judicial assessment of the “quality” or adequacy of such fulfilment which falls exclusively within the jurisdiction of the Constitutional Court.<sup>44</sup> *In casu* the complaint was that an Act was passed not without any public consultation at all, but without *enough* public consultation. This is a matter that falls to be decided exclusively by the Constitutional Court.

Though it has remained unspecified in the constitutional case law, jurisdictional subsidiarity is undeniably — but not rigidly or dogmatically — invoked to designate and empower authorised readers of the Constitution (and other texts relevant for constitutional interpretation and adjudication) and to delineate the authority of these readers. Jurisdictional subsidiarity has contributed considerably to making constitutional adjudication a sensible team effort and has contributed a great deal to the empowerment of a judiciary (and a legal community in general) for whom reading and applying a supreme Constitution came as a novelty (only) a little more than a decade ago.

## 5 Adjudicative subsidiarity

*Adjudicative subsidiarity* as an instance of strategic subsidiarity<sup>45</sup> guides the *adjudication* of substantive issues of law. It is this version of subsidiarity that has informed the dictum in the *Mhlungu* case<sup>46</sup> (which was cited right at the beginning of this article). As explained above, jurisdictional subsidiarity assigns adjudicative responsibility to an appropriate forum, thereby evincing, in constitutional interpretation and adjudication, the broader principle of subsidiarity in its institutional signification. Adjudicative subsidiarity, on the other hand, is “mode-” or “issue-centric”: it enjoins one and the same forum to prefer an aconstitutional (or, at least, an indirectly constitutional) to a strictly constitutional mode of adjudication whenever the solution of a legal question admits of the former (and does not of necessity require the latter). The highest authority of the Constitution is, in other words, not to be overused to decide issues that can be disposed of with reliance on specific, subordinate and non-constitutional precepts of law.

<sup>43</sup> Pars 20-23.

<sup>44</sup> Pars 20-23.

<sup>45</sup> *Cf* 2 *supra*.

<sup>46</sup> *S v Mhlungu supra*.

In *Zantsi v Council of State, Ciskei*,<sup>47</sup> Chaskalson P explained (without using the terminology) that adjudicative subsidiarity as just described can allow the law to develop incrementally, and this is desirable in view of the far-reaching implications attaching to constitutional decisions. Adjudicative subsidiarity moreover discourages court rulings “in the abstract on issues which are not the subject of controversy and are only of academic interest”<sup>48</sup> and also contributes to an appropriate demarcation of the respective spheres of authority of the legislature and the judiciary.<sup>49</sup> Constitutional over-adjudication, especially in reviewing legislation, could deprive the legislature of the opportunity to deal with an issue of its own accord, in its own distinctive manner and in response to its mandate from the electorate. The legislature and the executive are often better equipped than the courts are to gauge and respond to the needs of society. In addition they are democratically accountable. From these observations it appears that there is also a connection between adjudicative subsidiarity and the doctrine of separation of powers (or *trias politica*). This connection will be looked at more closely under the next heading.

Bland and unthoughtful (over-)reliance on adjudicative subsidiarity could enervate the precedence of the Constitution as supreme law. The Constitutional Court has thus, on occasion, found it necessary to contain reliance on this form of subsidiarity. In the *Zantsi* case,<sup>50</sup> Chaskalson P, for instance, observed that the Constitutional Court will constitutionalise an issue whenever it *is necessary* to dispose of a matter on appeal. He added that adjudicative subsidiarity cannot stand in the way of “the interest of justice”. In *Harksen v Lane NO*<sup>51</sup> Goldstone J also made it clear that there is no “hard and fast rule to the effect that in no case should referrals be made to this Court where non-constitutional remedies have not been exhausted”.

Adjudicative subsidiarity can at any rate not justify interpretive and/or adjudicative preference for a non- (or not strictly) constitutional option inconsistent with the Constitution. Where there are several options (equally) consistent with the Constitution, adjudicative subsidiarity can, at best, prompt preference for the option most consistent with the non-constitutional law as it stands.

In *The Pharmaceutical Manufacturers Association of SA In Re: The Ex Parte Application of the President of the RSA*,<sup>52</sup> the Constitutional Court rejected the conclusion of the Supreme Court of Appeal in *Commissioner of Customs and Excise v Container Logistics (Pty) Ltd; Commissioner of*

<sup>47</sup> 1995 10 BCLR 1424 (1995 4 SA 615) (CC) par 5.

<sup>48</sup> Par 7.

<sup>49</sup> Currie & De Waal *The Bill of Rights Handbook* 5 ed (2005) 75-78.

<sup>50</sup> *Zantsi v Council of State, Ciskei supra* par 4.

<sup>51</sup> 1997 11 1489 (1998 1 SA 300) (CC) par 26.

<sup>52</sup> 2000 3 BCLR 241 (2000 2 SA 674) (CC).

*Customs and Excise v Rennie Group Ltd trading as Renfreight*,<sup>53</sup> that the review of administrative action has to a large extent remained a procedure determined primarily by common law. Chaskalson P, in no uncertain terms, affirmed the supremacy of the Constitution where and whenever the exercise of any form of public power becomes susceptible to judicial assessment:<sup>54</sup>

“The control of public power by the courts through judicial review is and always has been a constitutional matter . . . The common law principles that previously provided the grounds for judicial review of public power have been subsumed under the Constitution, and in so far as they might continue to be relevant to judicial review, they gain their force from the Constitution. In the judicial review of public power, the two are intertwined and do not constitute separate concepts.”<sup>55</sup>

The *Pharmaceutical Manufacturers* case<sup>56</sup> was the Constitutional Court’s response to a tendency of the Supreme Court of Appeal (at the time) to pretend that constitution-related issues can be disposed of in an “enlightened”, rights-friendly manner without reference to (let alone reliance on) the Constitution. In this way the South African common law on defamation was liberalised, for example, by extending the protection of free speech. This was done in a judgment (to wit *National Media Ltd v Bogoshi*)<sup>57</sup> professing not to draw on constitutional resources. The law of evidence relating to sexual offences was also modernised (in *S v Jackson*)<sup>58</sup> by abolishing the so-called cautionary rule of evidence in rape cases without mentioning the word “Constitution” even in passing.

On the one hand, such a tendency may be seen as an outcome of profitable reliance on adjudicative subsidiarity, giving effect to a preference of the Constitutional Court itself (that is, the preference verbalised in the *Mhlungu* dictum). On the other hand, it raises the question whether the Constitution was meant simply to function as a silent background norm whenever the common law stands to be “liberalised”. The Supreme Court of Appeal’s seemingly enlightened judgments on free speech and the cautionary rule in sexual offences would most probably not have been handed down had it not been for (the existence of) the Constitution with its Bill of Rights. Does it become any court to allow itself to be influenced by the Constitution and then not acknowledge it? The Constitutional Court in the *Pharmaceutical Manufacturers* case<sup>59</sup> suggested that it does not — at least not when the exercise of public power enters into the picture.

<sup>53</sup> 1999 8 BCLR 833 (1999 3 SA 771) (SCA).

<sup>54</sup> *Cf* eg pars 17, 20, 27, 33, 44 and 45.

<sup>55</sup> Par 33.

<sup>56</sup> *The Pharmaceutical Manufacturers Association of SA In Re: The Ex Parte Application of the President of the RSA supra*.

<sup>57</sup> 1998 4 SA 1196 (SCA).

<sup>58</sup> 1998 1 SACR 470 (SCA).

<sup>59</sup> *The Pharmaceutical Manufacturers Association of SA In Re: The Ex Parte Application of the President of the RSA supra*.

A court, with prudent reliance on “non-constitutional” law, can often resolve an issue in a manner very much consistent with — and indeed conducive to — constitutional values (and the spirit, purport and objects of the Bill of Rights), without necessarily “reaching a constitutional issue”.<sup>60</sup> A case in which the Supreme Court of Appeal could have done this, but unfortunately did not do it, was *Afrox Health Care Bpk v Strydom*.<sup>61</sup> To conclude this discussion of adjudicative subsidiarity, this case will next be considered critically, and will then briefly be contrasted with the case of *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuzo*<sup>62</sup> in which the same Court prudently developed the common law in response to a constitutional exigency, and yet refrained from out and out constitutionalising the issue under consideration.

### 5 1 *Afrox Health Care Bpk v Strydom*

In this case the question was whether, Strydom, the respondent, was bound by an exemption clause in a written (standard) contract that he had concluded with a private hospital group (the appellant) upon his admission to one of its hospitals. The clause indemnified the appellant against any claim for damages or injury a patient (*in casu* the respondent) might suffer as a result (even) of the negligence of any hospital in the group and/or its personnel. The Supreme Court of Appeal thought that this was a case where optimum effect (and recognition) had to be given to both the appellant’s and the respondent’s freedom of contract,<sup>63</sup> since this form of freedom is commensurate with (and indeed an incarnation of) the prominence which freedom and human dignity enjoy as guiding values in the (South African) Constitution.<sup>64</sup> A court should, accordingly, be slow to interfere with terms of agreements which free-willing parties had entered into consciously, and this includes a mutually agreed on exemption clause which *in casu* (and in effect) excused the appellant from (and thus indemnified it against) all negligence short of gross negligence on its part.

The respondent argued (*inter alia*) that the questionable exemption clause infringed his section 27(1)(a) constitutional right of access to health care services<sup>65</sup> and was therefore not enforceable. Reliance on this particular right was, in the circumstances, ill-conceived. Uncertainty surrounds the enforcement of constitutionally entrenched, *socio-economic* entitlements against *private* persons or institutions, and the 1996 Constitution, in which the section 27(1)(a) right occurred for the first time, was at any rate not in force yet when the respondent’s contract with

<sup>60</sup> *S v Mhlungu supra* par 59.

<sup>61</sup> 2002 6 SA 21 (SCA).

<sup>62</sup> 2001 4 SA 1184 (SCA).

<sup>63</sup> Par 8.

<sup>64</sup> Pars 22-23; and *cf* ss 1(a), 7(1), 36(1) and 39(1)(a) of the Constitution. Human dignity is also the substance of an entrenched right; *cf* s 10 of the Constitution.

<sup>65</sup> Pars 15-16 and 19-20.

the appellant was concluded on 15 August 1995.<sup>66</sup> The obvious constitutional right at stake in this case was rather Strydom’s right to the security of his person entrenched in section 11(1) of the transitional Constitution<sup>67</sup> (and this escaped the attention of both of the parties and of the Court). In contracting with the appellant the respondent, typically like a patient who is being admitted to hospital, put his physical (and psychological) well-being in the hands of the appellant (and its personnel) because he needed specialist care (else he could just as well have opted for home-nursing). It is hard to see that (and how) — with a constitutionally guaranteed right to security of the person in place, and with the common law of contract on exemption clauses construed with due regard to the spirit, purport and objects of the 1993 Bill of Rights<sup>68</sup> — a hospital could successfully rely on a contractual exemption clause excusing its negligent non-performance of exactly that which its patient sought to procure by entering into the contract with it, namely diligent and expert care for the security of his person jeopardised by illness.

Tjakkie Naudé and Gerhard Lubbe convincingly show that it (also) follows from sound and solid law-of-contract reasoning that it should not be possible to conclude a contract which, via an exemption clause, negates its own essence.<sup>69</sup> The authors come to this conclusion not just by looking at contemporary trends in the law of contract, but also with reliance on historical material going as far back as the ancient Greek philosopher, Aristotle. Adjudicative subsidiarity would designate an argumentative strategy like that of Naudé & Lubbe as the most appropriate in a case like *Afrox*. But this does not mean that the Constitution and constitutional values exit the picture. The conclusions of Naudé & Lubbe also happen to be most in conformity with the “constitutional conclusion” that the exemption clause in the hospital’s standard contract is inconsistent with the protection afforded (and the value attached) to Strydom’s constitutional right to security of his person. For a court to mention this in support of a finding that the exemption clause should not be enforced, would not be tantamount to “reaching a constitutional issue”.<sup>70</sup> It would rather be a judicial intimation (and a recognition of the fact) that the law of contract can, in this particular case very much on its own terms, be developed to promote the spirit, purport and objects of the Bill of Rights.<sup>71</sup> “Reaching

<sup>66</sup> The transitional Constitution of 1993 that was in force at the time did not contain any provisions similar to ss 26 and 27 of the 1996 Constitution guaranteeing a right of access to a number of commodities.

<sup>67</sup> Presently enshrined in s 12(1) of the 1996 Constitution. Had the latter Constitution been applicable to this case, Strydom’s s 12(2) right to bodily and psychological integrity would probably also have been on the line.

<sup>68</sup> As was required by s 35(3) of the transitional Constitution.

<sup>69</sup> Naudé & Lubbe “Exemption Clauses — a Rethink Occasioned by *Afrox Healthcare Bpk v Strydom*” 2005 *SALJ* 441 especially 445-453.

<sup>70</sup> Per Kentridge AJ in *S v Mhlungu* *supra* par 59.

<sup>71</sup> In accordance with the requirements of s 39(2) of the Constitution.

a constitutional issue” in the *Afrox* case would have meant deciding the issue on the basis of how section 11(1) of the transitional Constitution can best be construed to cater for the *Afrox* type situation (which would have involved a directly horizontal enforcement of the constitutional right entrenched in the section).<sup>72</sup> However, the latter approach runs the risk of impeding the development of the law of contract on exemption clauses as *law of contract* (subject, at any rate, to — and disciplined by — the Constitution and the Bill of Rights).

In the actual judgment of the Supreme Court of Appeal handed down in the *Afrox* case, the most unfavourable of all possibilities for the development of the common law and for the realisation of constitutionally entrenched fundamental rights and values in (and through) the (common) law of contract, prevailed. The Supreme Court of Appeal put its faith in a version of the law of contract that was formalistic in the extreme, outdated and, to crown it all, historically suspect (as Naudé & Lubbe point out). The court’s triumphant identification of human dignity and freedom (manifested in freedom of contract) as *the* key constitutional values to be honoured, was rather bland, artificial — and uninformed with any sense of reality. If contractual freedom indeed is an instance of freedom-with-dignity then most certainly it cannot be just an unfettered, libertarian, free-for-all type of freedom. It is hard to see how the law of contract pertaining to exemption clauses can be construed (and left undeveloped) to allow a “stronger” contracting party to enforce, against a “weaker” party, a contractual exemption which, to no insignificant degree, undoes the essence of that to which the parties have ostensibly committed themselves reciprocally, namely the procurement of the “weaker” party’s security of the person in circumstances where he is in need of specialist, physical care. The failure of the parties and of the court in the *Afrox* case to identify the actual constitutional right(s) (and values) at stake, ensured that as an example of what adjudicative subsidiarity can work for constitutionally sensitive and sensible adjudication, *Afrox* would remain a non-starter.

As was intimated before, “reaching a constitutional issue” in the *Afrox* situation would have involved a directly horizontal application of section 11(1) of the transitional Constitution (against a private hospital as caretaker-at-fault). This reminisces the Constitutional Court’s once landmark (and now almost forgotten) judgment of *Du Plessis v De Klerk*<sup>73</sup> in which it was held that section 7(1) and (2) of the transitional Constitution had to be understood restrictively so as to exclude a directly (as opposed to an indirectly) horizontal operation of its Bill of Rights. However, section 8(1)-(3) (and especially 8(2) and 8(3)) of the 1996 Constitution, the successor to section 7(1) and (2), does seem to allow for

<sup>72</sup> See the discussion *infra*.

<sup>73</sup> 1996 5 BCLR 659 (1996 3 SA 850) (CC).

a directly horizontal application of the Bill of Rights. Section 8(2), for instance, stipulates that “[a] provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right”. There has not been a *Du Plessis v De Klerk* on section 8 (yet),<sup>74</sup> but in *Khumalo v Holomisa*,<sup>75</sup> O’Regan J intimated that direct horizontal application of the Bill of Rights (to natural and juristic persons) is always a distinct possibility, depending on the circumstances of each particular case. Section 8(3) of the Constitution, however, requires (or, at least, prefers) any directly horizontal application of a right in the Bill of Rights to be mediated by the common law, especially in the absence of legislation giving effect to such a right. “Common law” can be the common law as it stands or the common law as developed by the court (should the law as it stands fail to cater for the exigencies of a particular case in a manner promoting the spirit, purport and objects of the Bill of Rights). Section 8(3) thus leaves ample room (and indeed encourages and creates opportunities) for adjudicative subsidiarity as understood in *Mhlungu* and as explained in the discussion up to now.

## 5 2 The *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuz*<sup>76</sup>

Section 38(c) of the Constitution confers standing in constitutional (and, in particular, in Bill of Rights) litigation on “anyone acting as a member of, or in the interest of, a group or class of persons”. Section 7(b)(iv) of the transitional Constitution first anticipated (and authorised) the use of class actions in constitutional litigation in the same explicit terms as section 38(c) of the Constitution presently does, thereby creating a need for the development of the existing common law of civil procedure in respect of a traditionally underutilised mode of litigation in the South African context.<sup>77</sup> The case of *Ngxuz v Permanent Secretary, Department of Welfare, Eastern Cape*<sup>78</sup> provided, first, the Eastern Cape Division of the High Court and subsequently, on appeal, the Supreme Court of Appeal<sup>79</sup> with an opportunity to break fresh ground in this regard.

One of the questions that had to be answered in this case was whether (potential) litigants, identifiable as members of a class but residing

<sup>74</sup> The way in which s 8 of the 1996 Constitution has been structured, arguably precludes the necessity of an effort as monumental as *Du Plessis v De Klerk supra* to unravel the mystery of (direct) horizontal application.

<sup>75</sup> 2002 8 BCLR 771 (2002 5 SA 401) (CC) pars 31-34.

<sup>76</sup> *Supra*.

<sup>77</sup> Cameron JA refers to class actions as envisaged in the Constitution as “an innovation expressly mandated by the Constitution” *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuz supra* par 22.

<sup>78</sup> *Ngxuz v Permanent Secretary, Department of Welfare, Eastern Cape supra*.

<sup>79</sup> *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuz supra*.

outside of the area of jurisdiction of the Eastern Cape High Court, could (in the said court) be recognised as members of a class of plaintiffs bringing an action against the Eastern Cape Department of Welfare consequent upon withholding their disability grants unlawfully. The manner in which both courts dealt with this specific question, significantly illustrates proper and prudent reliance on adjudicative subsidiarity. Froneman J verbalised the court *a quo*'s position as follows:

"Even if the members of the class residing outside the area of jurisdiction of this Court but elsewhere in South Africa are not parties to the action in the strict sense of the word as used in s 19(1)(b) of the Supreme Court Act, they may still be regarded as members of the class in the action in this Court . . . The *ratio jurisdictionis* connecting them to the case is the class action itself. If this amounts to a development of the common law, I am of the view that such a development is justified and permissible by virtue of ss 172(1) and 173 of the Constitution. In *Estate Agents Board v Lek* 1979 (3) SA 1048 (A) at 1063F it was stated that the question whether a court has jurisdiction 'depends on (a) the nature of the proceedings, (b) the nature of the relief claimed therein, or (c) in some cases, both (a) and (b)'. Having regard to these factors it is perhaps not even necessary to call ss 172(1) and 173 of the Constitution in aid (compare also s 19(1)(a)(iii) of the Supreme Court Act 59 of 1959)."<sup>80</sup>

From this dictum appears, first, the court's deference to a constitutional exigency, namely to develop the (existing) law regarding class actions for purposes of constitutional litigation, and, secondly, resort to (a strategy of) adjudicative subsidiarity, searching the existing case law (and not the constitutional text) with a fine comb for a point of contact or catalyst to get the constitutionally required development going. This leads the court to the conclusion that it may perhaps not even be "necessary to call . . . the Constitution in aid" to effect the actual development. The Constitution as catalyst or agent for the development of the existing law is therefore not necessarily also the source for it.

In the judgment on appeal a similar *modus operandi* was followed, with Cameron JA holding that:

"We are enjoined by the Constitution to interpret the Bill of Rights, including its standing provisions, so as to 'promote the values that underlie an open and democratic society based on human dignity, equality and freedom'. As pointed out earlier we are also enjoined to develop the common law which includes the common law of jurisdiction so as to 'promote the spirit, purport and objects of the Bill of Rights'. This Court has in the past not been averse to developing the doctrines and principles of jurisdiction so as to ensure rational and equitable rules. In *Roberts Construction Co Ltd v Willcox Bros (Pty) Ltd*<sup>81</sup> this Court held, applying the common-law doctrine of cohesion of a cause of action (*continentia causae*), that where one court has jurisdiction over a part of a cause, considerations of convenience, justice and good sense justify its exercising jurisdiction over the whole cause. The partial location of the object of a contractual performance (a bridge between two provinces) within the jurisdiction of one court therefore gave that court jurisdiction over the whole cause of action. The Court expressly left open the further development and application of the doctrine of cohesion of causes. The present seems to me a matter amply justifying its further evolution. The Eastern Cape Division has jurisdiction over the original applicants and over members of the class entitled to payment

<sup>80</sup> *Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape* supra 628G-629H.

<sup>81</sup> 1962 4 SA 326 (A).



of their pensions within its domain. That, in my view, is sufficient to give it jurisdiction over the whole class, who, subject to satisfactory ‘opt-out’ procedures, will accordingly be bound by its judgment.”<sup>82</sup>

Once again a constitutional injunction inspired development of the existing (common) law on class actions, but *continentia causae*, a recognised legal notion from within the existing law, infused it. This was adjudicative subsidiarity-in-action, no doubt.

## 6 Adjudicative subsidiarity, constitutional supremacy and judicial restraint

Adjudicative subsidiarity presupposes a nuanced, non-absolutist understanding of constitutional supremacy. It will therefore be helpful to consider, first, why it can be said that the Constitution is supreme (law); secondly, how the practice of judicial self-restraint (induced by considerations of *trias politica*) help illustrate that constitutional supremacy is not tantamount to constitutional absolutism; and then, finally, to consider the implications of the foregoing for adjudicative subsidiarity.

The constitutional text itself proclaims (and articulates) the Constitution’s supremacy. In section 2 it is stated that:

“This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.”

This contention is affirmed by section 8(1)’s statement that the Bill of Rights (chapter 2 of the supreme Constitution) is (highest law) applicable to *all law*, in other words, to statute, common (including case) and customary law, and that it binds the legislature, the executive, the judiciary and all organs of State. These assertions of constitutional supremacy are backed by operational stipulations providing for the justiciability of the Constitution:

- Court orders are binding on all organs of State.<sup>83</sup>
- The Constitution vouches for the independence of the judiciary,<sup>84</sup> and provides for the jurisdiction of the Constitutional Court,<sup>85</sup> the Supreme Court of Appeal<sup>86</sup> and High Courts<sup>87</sup> in, amongst others, *constitutional matters* which are said to involve “the interpretation, *protection or enforcement* of the Constitution” (own italics).<sup>88</sup>

<sup>82</sup> *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuzo supra* par 22.

<sup>83</sup> S 165(5).

<sup>84</sup> S 165(2) and (3).

<sup>85</sup> S 167(3)–(7).

<sup>86</sup> S 168(3) albeit by implication. The subsection refers to the SCA’s jurisdiction in constitutional matters in a manner implying that this Court has such jurisdiction: it “is the highest court of appeal *except in constitutional matters*” (my italics).

<sup>87</sup> S 169(a) explicitly refers to these courts’ jurisdiction in constitutional matters.

<sup>88</sup> S 167(7).

- Section 172 details the powers of the courts aforesaid in constitutional matters. Of considerable significance for upholding constitutional supremacy is these courts' constitutional *duty* ("a court must . . .") to "declare that any law or conduct inconsistent with the Constitution is invalid to the extent of its inconsistency".<sup>89</sup>

Making themselves felt side by side with the direct and auxiliary affirmations of constitutional supremacy above-said, are indicia in the constitutional text that constitutional review is to be exercised with restraint, especially when, in relation to statute law, a court exercises its *testing right*. Thus the selfsame section 172(1) of the Constitution requiring and, indeed, instructing a court with jurisdiction in constitutional matters to declare law or conduct inconsistent with the Constitution invalid, also provides for means to restrain the effects of a declaration of invalidity: a court may make any order that is just and equitable, including an order limiting the retrospective effect of a declaration of invalidity, or the court may suspend such a declaration for any period and on any conditions so as to afford a competent authority the opportunity to correct the defect.<sup>90</sup> Conventionally considerations of separation of powers (*trias politica*),<sup>91</sup> rather than subsidiarity, have informed the idea and practice of *judicial self-restraint* implicit in these constitutional provisions. Judicial review of legislation raises the spectre of *counter-majoritarianism* (or "the counter-majoritarian difficulty" as it is also known). The competence of unelected judges to assess the constitutional tenability of laws made by democratically elected, deliberative legislatures and then to strike down whatever (in their view) is inconsistent with the Constitution, suspectedly (but not always and inevitably) runs counter to the horizontal differentiation of legislative, executive and judicial authority in a modern-day, democratic State<sup>92</sup> — hence the clarion call to the judiciary for self-restraint.

Though they share the potential to contribute to a de-absolutisation of the Constitution's power, there are elemental differences between *trias politica* and subsidiarity, best illustrated when *trias politica* and *institutional* subsidiarity are compared. Institutional subsidiarity, as pointed out before, is possible only among institutions or bodies

- sharing a sense of relatedness (coupled with commitment to a common purpose) *inter se*,

<sup>89</sup> S 172(1)(a); *Mkangeli v Joubert* 2001 4 BCLR 316 (2001 2 SA 1191) (CC) par 10.

<sup>90</sup> S 172(1)(b).

<sup>91</sup> Leading case law authorities on *trias politica* are *Bernstein v Bester* NNO 1996 2 SA 751 (1996 4 BCLR 449) (CC) par 105; *De Lange v Smuts NO* 1998 3 SA 785 (1998 7 BCLR 779) (CC), and *SA Association of Personal Injury Lawyers v Heath* 2001 1 BCLR 77 (CC) par 22.

<sup>92</sup> Tushnet "Anti-formalism in Recent Constitutional Theory" 1985 (83) *Michigan Law Review* 1502 1503; Davis, Chaskalson & De Waal *Democracy and Constitutionalism: The Role of Constitutional Interpretation* in Van Wyk, Dugard, De Villiers & Davis (eds) *Rights and Constitutionalism: The New South African Legal Order* (1994) 1 6-19 and Currie & De Waal *Bill of Rights Handbook* 22.

- with an appreciable overlap in their objectives (or meaningful points of tangency in the functions they fulfil), and
- in respect of which there is a possibility for the devolution of responsibility (and power) from more central (and more intensely empowered) levels (or spheres) of governance to more local (and less intensely empowered) levels (or spheres).

*Trias politica*’s concern is with three distinct types (or modes) of State authority,<sup>93</sup> distinguishable not because they fulfil similar functions at different levels of centrality (with variations in their intensity or degree of authority), but because, as equals-in-principle, their purposes and functions are intrinsically dissimilar. The three types of authority, each on its turf, (can) function in accordance with the exigencies of institutional subsidiarity — hence central and less central (and more and less powerful) legislatures, administrative organs and courts. The well-being of the State is seen to depend on each type of State authority performing its own typical functions, with due respect for the typicalness (and the province) of — but not exerting itself in isolation from — the others. Ideally these three types of State authority should restrict — or “check and balance” — one another.

Judicial self-restraint instantiates courts’ deference to the typicalness (and their non-intrusion into in the province of) legislatures and administrative organs of State, and it implies (and indeed requires) a constitutional reading strategy which, in its turn, commences with a realistic appraisal of what a supreme Constitution is. It is imperative that especially the judiciary, the branch of government most explicitly and most powerfully authorised to construe the Constitution and uphold it *vis-à-vis* the other two branches,<sup>94</sup> will be heedful not to (over-)use the Constitution’s supreme authority to thwart the crucial balance of power between itself, the legislature and the executive.

A supreme Constitution is the nation’s solemn and consequential memorandum of agreement. *It is also just a document*, however: a written law-text amongst others or “a *linguistic datum*”.<sup>95</sup> The 1996 Constitution is the supreme law of the Republic of South Africa, but *it is not* an overarching, all-encompassing, super law.<sup>96</sup> As a text authored by a demonstrable constitution-maker it is, like any statute authored by a demonstrable law-maker, a *normative* law-text, existing side by side with other normative law-texts (such as norms of the common law or of customary law) which are not attributable to the authorship of

<sup>93</sup> Sometimes also referred to as “branches of government”.

<sup>94</sup> That much appeared from the consideration of the provisions of s 172(1) *supra*.

<sup>95</sup> In the words of Müller “Basic Questions of Constitutional Concretisation” 1999 *Stell LR* 269.

<sup>96</sup> Du Plessis “The Status of Legislation and the Realisation of Constitutional Values in the New Constitutional Dispensation” 2000 *Stell LR* 192 201 and *Re-Interpretation* 28.

immediately demonstrable makers.<sup>97</sup> The Constitution enjoys precedence among normative law-texts without, however, totally overpowering or simply defeating them, and it certainly is not meant to substitute them in every conceivable situation. It is on this score that opportunities for constructive reliance on adjudicative subsidiarity to de-absolutise the power of the Constitution, open up. This is best understood when an analogy is drawn between institutional subsidiarity (as it was explained above in order to distinguish it from *trias politica*) and adjudicative subsidiarity when it is relied on in quest of avoiding an over-constitutionalisation of issues (as envisaged in the *Mhlungu* case<sup>98</sup>).

Co-existing constitutional and non-constitutional norms may share a sense of relatedness (coupled with the pursuit of a common purpose) *inter se*, and there may be an overlap in their objectives (or points of tangency in the functions they fulfil) sufficiently appreciable to make them “compete” for application in a specific situation. In such a situation the exigencies of adjudicative subsidiarity put forward the non-constitutional norm as the stronger contender for application. However, it must be possible to devolve authority to the non-constitutional norm, meaning that this norm must not contradict or be otherwise inconsistent with the constitutional norm, for if this happens, the supreme authority of the constitutional norm demands its prevalence, but this still will not obviate or terminate the effect of adjudicative subsidiarity without more ado. If it is at all possible to effect the peaceful coexistence of the constitutional and the non-constitutional norm by, for instance, reading down the latter<sup>99</sup> or developing it,<sup>100</sup> this state of affairs is preferable to simply striking it down. True, there is a hierarchy of norms in this situation, with the constitutional norm at the apex, but it is not a hierarchy of more and less comprehensive or encompassing norms (with the constitutional norm “speaking on behalf of” the non-constitutional norm): it is a hierarchy of trumps — a phenomenon not unfamiliar to statute law. If (subordinate) delegated legislation is pitched against the (higher or superordinate) original legislation authorising it, the latter will trump the former (only) *in so far as they cannot co-exist or be reconciled*. Since 27 April 1994 a supreme Constitution has found itself at the apex of a hierarchy not only of laws enacted by legislatures, but also of common and customary law norms, and as is the case with delegated *vis-à-vis* original legislation, it is not readily assumed that the “higher law” invariably has to undo and take the place of the “lower law”.

<sup>97</sup> Wille *Principles of South African Law* 8 ed (1991) 1 verbalises this notion as follows: “Laws in the wide sense are simply rules of action. In this sense a law is a statement of what invariably recurs time after time in certain given conditions or circumstances.”

<sup>98</sup> *S v Mhlungu* *supra* par 59.

<sup>99</sup> This procedure of “reading down” is sometimes also referred to as “interpretation in conformity with the constitution” (*Verfassungskonforme Auslegung*) Du Plessis *Re-Interpretation* 140-143.

<sup>100</sup> In accordance with ss 8(3) and 39(2) of the Constitution.

It is beyond dispute that constitutional and non-constitutional norms share one overriding, overarching (highest) objective, namely to optimise the effect of constitutional values and lend the best possible protection to fundamental rights entrenched in the Bill of Rights. If a non-constitutional norm or norms can achieve this objective quite handsomely, direct reliance on such a norm or norms in *constitutional* construction and adjudication is wholly appropriate, for that would help to locate constitutional values and rights right where they belong, namely at the very grassroots of concretising and applying “ordinary” law. These values and rights are more actively and enduringly honoured in this way, than by attempts to subsume, as a matter of course, every single case of constitutional adjudication under constitutional norms couched in expansive and open-ended phraseology.

What, under the present heading, has been described so far is a subsidiarity induced *preference* for not “reaching a constitutional issue”<sup>101</sup> — it is not an attempt to deny or eliminate constitutional issues altogether or to ignore the Constitution whenever possible. As was pointed out in the *Pharmaceutical Manufacturers* case,<sup>102</sup> there are certain issues, for instance the exercise of public power, which are inevitably (and only) constitutional issues,<sup>103</sup> and whose resolution depends on a proper *construction* of the *constitutional text* as prime source of *constitutional law*. Besides, even when the Constitution functions as a trump in a situation where non-constitutional law is invoked to deal with a matter, it is still impossible to ignore the former as supreme law: it is in the nature of a trump *as trump* to maintain a scouting ubiquity.

## 7 Evaluative perspectives — in conclusion

Subsidiarity (and, in particular, adjudicative subsidiarity) need not enervate or undermine the authority of the supreme Constitution — though there is no guarantee that it could not (and never will). However, to avoid reliance on (adjudicative) subsidiarity just because of this possibility (or “danger”) would be to throw the baby out with the bathwater. Subsidiarity has the beneficial and wholesome potential to steer the development of non-constitutional law in a direction where the spirit, purport and objects of the Bill of Rights (and of the Constitution as a whole) are promoted in life’s concrete situations, at the grassroots, as it were, where answers to legal questions are most urgently called for. It is worthwhile to live with such a “danger”. An analogy may help explain why this is so.

<sup>101</sup> Cf *S v Mhlungu* supra par 59.

<sup>102</sup> *The Pharmaceutical Manufacturers Association of SA In Re: The Ex Parte Application of the President of the RSA* supra.

<sup>103</sup> *Supra* par 33.

Henk Botha, writing about the counter-majoritarian difficulty, concludes that there is no point in trying to resolve this intricacy and that living with it instead may be wholesome, because the tensions it generates could be creative (rather than destructive) in sculpting a constitutional order.<sup>104</sup> These tensions may, for instance, help to keep an institutionally mediated dialogue between the legislature and the judiciary alive.<sup>105</sup> Likewise, the tension between a possible invigoration and enervation of the Constitution, attendant on (adjudicative) subsidiarity, could also result in a creative prevalence over both constitutional minimalism and totalitarianism, trumping “an easy way out” essentialism with its propensity to oversimplify solutions for complex issues.

Van Wyk points out that subsidiarity can also pertain to the relationship between the State and the individual (as well as other bearers of fundamental rights) and he sees the strong emphasis in South Africa’s two supreme Constitutions since 1994 on freedom and equality (and, in time, also on human dignity) as a wholesome consequence of subsidiarity.<sup>106</sup> The view that subsidiarity can contribute to giving a certain content and meaning to the relationship between the State and the individual (as well as the State and free associations of individuals) finds support in some more philosophical depictions of subsidiarity too.<sup>107</sup> According to this view, subsidiarity is not just about leaving individuals (and their associations) to themselves to do as they please, but also to empower them to be free to act, and through their action, to promote the common good.

This once again raises a question previously posed in passing (and not answered yet).<sup>108</sup> *Is subsidiarity as “the quality of being subsidiary”<sup>109</sup> attributable primarily to subsidiary (and subordinate) or rather to comprehensive (and superordinate) institutions/norms?* This question can be teased out as follows: *If subsidiarity is about preference for (less comprehensive, subordinate) subsidiaries either as (institutional) doers or as (strategic) norms for doing, does the term “subsidiarity” (i) refer to the preference for these subsidiaries as such or (ii) does it, given this preference, verbalise comprehensive (and superordinate) authorities’*

<sup>104</sup> Botha “Democracy and Rights: Constitutional Interpretation in a Postrealist World” 2000 *THRHR* 561 578-581.

<sup>105</sup> De Ville *Constitutional and Statutory Interpretation* (2000) 20-26.

<sup>106</sup> Van Wyk *Subsidiariteit* 258-260.

<sup>107</sup> Audi (ed) *The Cambridge Dictionary of Philosophy* 2 ed (1999) 886-887 and the *PC Bibliothek. Meyers Lexikon: Politik und Gesellschaft* (1993) which defines “the principle of subsidiarity” as follows: “Subsidiaritätsprinzip [von lateinisch subsidiarius ‘zur Hilfe dienend’] : Prinzip, wonach jede gesellschaftliche und staatliche Tätigkeit ihrem Wesen nach für das Individuum oder die Familie ‘subsidiär’ ( unterstützend und ersatzweise eintretend) ist, die höhere staatliche oder gesellschaftliche Einheit also nur dann helfend tätig werden und Funktionen der niederen Einheiten an sich ziehen darf, wenn deren Kräfte nicht ausreichen, diese Funktionen selbst wahrzunehmen. Das S. wird v. a. von der katholischen (christlichen) Soziallehre als Ordnungsprinzip für das Verhältnis Individuum (Familie) Gesellschaft Staat und für dessen inneren Aufbau empfohlen.”

<sup>108</sup> Cf par 2 *supra*.

<sup>109</sup> *Shorter Oxford English Dictionary* on CD-ROM.

assignment to but “subsidiary functions” instead?<sup>110</sup> The simple (but not simplistic) answer to this question is that with subsidiarity *it is never* “either . . . or” — never one-way traffic — but always “and . . . and” — always two-way traffic. Subsidiarity entails an approach to hierarchical relationships of authority which is “bottom-up” and “top-down” simultaneously.<sup>111</sup> The “bottom-up” or “negative” perspective is that subsidiaries should be left free (but not alone) to act or to have effect, as long as what they bring about is not contrary to the common good. The “top-down” or “positive” perspective is that more comprehensive and more intensely empowered doers should, for the sake of the common good, render assistance (*subsidium*) to (and thereby empower) subsidiaries (but not absorb their ability) to act or to have effect.<sup>112</sup>

This perception of subsidiarity also enhances our understanding of (and appreciation for) wholesome reliance on jurisdictional and adjudicative subsidiarity in working with (and construing the existing law in the light of) the Constitution. The Constitutional Court’s judgment in *Carmichele v Minister of Safety and Security*,<sup>113</sup> for instance, illustrates how due recognition of jurisdictional subsidiarity can result in the empowerment of lower (and less comprehensive) fora to assume primary responsibility for the constitutionally required development of the common law. The judgment itself was an act of empowerment, forthcoming from the Constitutional Court as highest (and most comprehensive) forum in constitutional matters. Thereafter it was (and has ever since been) left to other fora to initiate and proceed with the actual development of the common law. The Constitutional Court will step in only if in the developmental process, constitutionally enshrined values and rights (as manifestations of “the common good”) are somehow compromised.

It is also more understandable now why it would be wrong to rely on the “*Mhlungu* principle”<sup>114</sup> to justify anything smacking of a unilateral declaration of independence of existing law from the Constitution (and then to imply that adjudicative subsidiarity calls for such a *modus operandi*). Since (the possibility of) constitutionally induced development of the common law first materialised with the commencement of the transitional Constitution on 27 April 1994, an irrevocable two-way flow of traffic between constitutional values, rights and norms, on the one hand, and values, rights and norms of the existing law, on the other, was set in motion (albeit somewhat spasmodic at first). In the discussion above reference was made to precedents in which the desired two-way flow of the traffic was unduly impeded, examples being *National Media*

<sup>110</sup> Cf the definition of Pearsall (ed) *New Oxford Dictionary* 1851 quoted in par 2 *supra*.

<sup>111</sup> And not just (and essentially) a “‘van onder na bo’ benadering” as Van Wyk *Subsidiariteit* 254 suggests.

<sup>112</sup> Audi (ed) *Dictionary of Philosophy* 886.

<sup>113</sup> *Supra*.

<sup>114</sup> *S v Mhlungu supra* par 59.

*Ltd v Bogoshi*,<sup>115</sup> *S v Jackson*<sup>116</sup> and *Commissioner of Customs and Excise v Container Logistics (Pty) Ltd; Commissioner of Customs and Excise v Rennie Group Ltd trading as Renfreight*.<sup>117</sup> Taking constitutional values seriously, the outcome of at least the first two of these cases (fortunately) was not all that disappointing, but the failure to recognise the Constitution as source of values (and empowerment) in the development of the existing law (in all three cases), was disappointing nonetheless. *Afrox Health Care Bpk v Strydom*<sup>118</sup> was mentioned and discussed as a case in which development of the common law got stuck in the mud of judicial rigidity — and that, moreover, as a result of a misguided and out of place appeal to “constitutional rights and values”. An alternative adjudicative strategy was also suggested for that case, though it must immediately be added that such a suggestion should not be understood to be a one and only recipe: each individual case makes its own demands and to try and format a template for all cases, will again just result in rigidification. Aspects of the two *Ngxuza* judgments in the Eastern Cape High Court<sup>119</sup> and the Supreme Court of Appeal<sup>120</sup> respectively, were held up as judicial incarnations of a viable and exemplary contrast to the judgment in *Afrox*.

The development of the existing law in the light of the Constitution is too big a topic to give it the attention that it deserves with but a few strokes of the pen in a single journal article. My rather modest objective has thus merely been to present a credible argument in support of involving and, indeed, invoking “subsidiarity” *by its name* in constitutional interpretation and adjudication (and therefore, by implication, in the development of the existing law in the light of the Constitution too). Naming a phenomenon (or actually, as in the present case, just starting to call it by its right name) while reflecting on its qualities and effects, deepens our understanding of the possibly wholesome consequences that (the implementation of) such a phenomenon may hold. This is what, for instance, happened to the notion of “proportionality”<sup>121</sup> in limitation jurisprudence, first recognised *eo nomine* by the Constitutional Court as a guide to the limitation of rights entrenched in the Bill of Rights,<sup>122</sup> and subsequently written into the constitutional text (but without naming it).<sup>123</sup> I trust that this article has lifted the veil somewhat on how (the implementation of) subsidiarity can contribute to the Constitution realising a mode of existence true to itself through the living law —

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<sup>115</sup> *Supra*.

<sup>116</sup> *Supra*.

<sup>117</sup> *Supra*.

<sup>118</sup> *Supra*.

<sup>119</sup> *Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape supra*; cf par 5 2 *supra*.

<sup>120</sup> *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza supra*; cf par 5 2 *supra*.

<sup>121</sup> Cf on “proportionality” in general, Kommers *Constitutional Jurisprudence of the Federal Republic of Germany* 46-48 and Currie & De Waal *Bill of Rights Handbook* 176-185.

<sup>122</sup> *S v Makwanyane* 1995 6 BCLR 665 (1995 3 SA 391) (1995 2 SACR 1) (CC) par 104.

<sup>123</sup> Cf s 36(1)(a)-(e) of the Constitution.



and how the living law, empowered by (and imbued with values emanating from the spirit, purport and objects of) the Constitution, can grow creatively and innovatively.

### OPSOMMING

Met ’n *dictum* van Kentridge WnR in *S v Mhlungu* 1995 7 BCLR 793 (1995 3 SA 867) (CC) par 59 as vertrekpunt, verken die skrywer die belang van subsidiariteit in (en vir) grondwetsvertolking en beregting. Hy identifiseer Kentridge WnR se omsigtigheidsvermaning dat enige saak, siviël of krimineel, verkieslik beslis moet word sonder om ’n grondwetlike geskilpunt daarvan te maak (“without reaching a constitutional issue”) as ’n verskyningsvorm van *beregtende subsidiariteit* wat van ’n hof verg om ’n a-(of minstens indirek) konstitusionele bo ’n streng konstitusionele wyse van geskilberegting te verkies wanneer die beslegting van die regspraak vir die eersgenoemde ruimte laat (en nie noodsaaklikewys die laasgenoemde verg nie). Dit onderskei die skrywer van *jurisdiksionele subsidiariteit* wat manifesteer as voorkeur vir ’n minder intens bemaagtigde en minder omvattende (“laer”) forum om ’n (grondwetlike) saak af te handel wanneer dit ook al moontlik is. Die potensiaal van altwee vorme van subsidiariteit om tot die ontwikkeling van die bestaande (veral gemene-)reg by te dra op ’n wyse wat grondwetlike waardes en regte bevorder, word ondersoek.

Na oorweging van moontlike voetangels wat ’n onbehoorlike beroep op subsidiariteit in die grondwetsvertolker en -beregter se pad kan plaas, word tot die slotsom geraak dat nadenkende steun op subsidiariteit in grondwetsvertolking en -beregting die tweerigtingverkeersvloei tussen grondwetlike waardes, regte en norme aan die een kant, en die waardes, regte en norme van (en ingevolge) die bestaande reg aan die ander kant aansienlik kan help vlot. Om subsidiariteit by die naam te noem en oor die eienskappe en effekte daarvan te besin kan, volgens die outeur, ons verstaan van die heilsame uitwerking wat (die implementering van) subsidiariteit kan hê, aansienlik verdiep (soos wat gebeur het met “proporsionaliteit” as maatstaf vir die beperking van grondwetlike regte). Subsidiariteit kan daartoe bydra dat die Grondwet ’n bestaanswyse, eie aan sigself, deur die lewende reg verwesenlik en dat die lewende reg, deur die Grondwet bemaagtig en besiel met waardes wat die gees, strekking en oogmerke van die Grondwet adem, kreatief en vernuwend kan groei.